

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
APPENDIX**



76-1469

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

B  
AS

DOCKET NO. 76-1469

UNITED STATES OF AMERICA

PLAINTIFF-APPELLEE

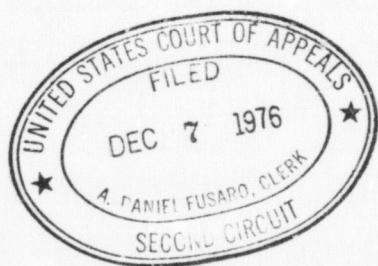
-vs-

HOWARD E. HAWLEY

DEFENDANT-APPELLANT

APPENDIX TO BRIEF FOR DEFENDANT-APPELLANT

HOWARD E. HAWLEY



ANDREW B. BOWMAN  
CHIEF FEDERAL PUBLIC DEFENDER

PETER GOLDBERGER  
ASST. FEDERAL PUBLIC DEFENDER  
770 CHAPEL STREET  
NEW HAVEN, CONNECTICUT

PAGINATION AS IN ORIGINAL COPY

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|            |                           |                     |
|------------|---------------------------|---------------------|
| OFFENSE PO | JUDGE/MAGISTRATE Assigned | U.S.                |
| OFFENSE MO | 0506                      | vs                  |
| MEANOR Mis | 205                       | Disp / Sentence     |
| FELONY Fel | 03                        | (LAST FIRST MIDDLE) |
| District   | Office                    |                     |

US TITLE/SECTION

18:2113(b)

OFFENSES CHARGED

took money from bank w/int to steal

JUVENILE 1

OFFICE OF THE FEDERAL

PUBLIC DEFENDER, NH

06-2 3 16 No of Dfts

JON

76 N-76-43 1

Yr Docket No Def

U.S. MAG CASE NO

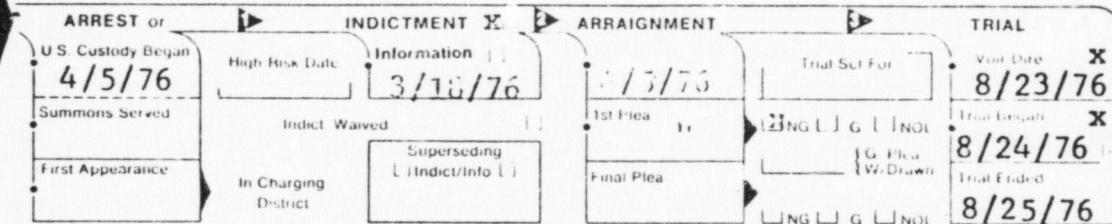
BAIL • RELEASE

|   |  |                                      |
|---|--|--------------------------------------|
| <input type="checkbox"/> Denied                         | AMT                                    | <input type="checkbox"/> Fugitive    |
| <input type="checkbox"/> Set                            |  | <input type="checkbox"/> Pers. Recog |
| \$<br>000   |  | <input type="checkbox"/> PSA         |
| Date<br><br>  |  | <input type="checkbox"/> conditions  |
| <input type="checkbox"/> Bail Not Made                  | <input type="checkbox"/> 10% Deposit   |                                      |
| <input type="checkbox"/> Status Changed<br>(See Docket) | <input type="checkbox"/> Surety Bond   |                                      |
|   | <input type="checkbox"/> Collateral    |                                      |
|   | <input type="checkbox"/> 3rd Ptry Cust | <input type="checkbox"/> Other       |

SENTENCE

27  
9/27/76Disposition of Charges  
8/25/76{ In All Charges  
On Lesser Offense(s)  
Acquitted  
Dismissed  
WOP: WP  
On Government's Motion

## II. KEY DATES &amp; INTERVALS



## MAGISTRATE

| SEARCH WARRANT | ISSUED | DATE | INITIAL/NO. | INITIAL APPEARANCE DATE | INITIAL/NO. | OUTCOME  |
|----------------|--------|------|-------------|-------------------------|-------------|--|
| SEARCH WARRANT | ISSUED |      |             | PRELIMINARY EXAMINATION |             | <input type="checkbox"/> DISMISSED   |
| SEARCH WARRANT | RETURN |      |             | OR                      |             | <input type="checkbox"/> HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT  |
| SEARCH WARRANT |        |      |             | REMOVAL HEARING         |             | <input type="checkbox"/> HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW |
| SEARCH WARRANT |        |      |             | SCHEDULED               |             |  |
| SEARCH WARRANT |        |      |             | HELD                    |             |  |
| SEARCH WARRANT |        |      |             | WAIVED                  | NOT WAIVED  | Tape Number  |
| SEARCH WARRANT |        |      |             | INTERVENING INDICTMENT  |             |  |

U.S. Attorney or Asst

Peter C. Dorsey  
Michael Martineau

## ATTORNEYS

Defense  CJA  Ret  Waived  Self  None / Other  CoGregory B. Craig, 770 Chapel St.  
New Haven, Conn.

\* Show last names and suffix numbers of other defendants on same indictment/information.

| DATE    | (DOCUMENT NO.) | PROCEEDINGS   | EXCLUDABLE DELAY      |
|---------|----------------|---|-----------------------|
| 3/18/76 |                | Indictment returned and filed at New Haven. Summons may issue for April 5, 1976 at 10:00 A. M. in New Haven. Zampano, J. m-3/15/76.   | (a) + (b) + (c) + (d) |
| 3/19/76 |                | Summons issued and handed to U.S. Marshal for service.  |                       |
| 3/30/76 |                | Marshal's return showing service, filed: Summons.   |                       |
| 4/3/76  |                | PLA: Deft. not present-Bench warrant to issue.<br>11:30 A.M. Deft. present, Bench warrant withdrawn. Plea of <u>not guilty</u> entered to Ct. 1. Federal Public Defender appointed as counsel. case continued on same bond of personal recognizance. Newman, J. m-4/5/76. |                       |
| 4/6/76  |                | Court reporter's Notes of Proceedings (Plea) held on 4/3/76, REC. Gale, R.  |                       |
| 4/7/76  |                | Notice of Readiness, filed by govt.   |                       |

BEST COPY AVAILABLE

| DATE<br>1976 | IV. PROCEEDINGS (continued)<br>(DOCUMENT NO.)  | PAGE TWO                      |                               | V. EXCLUDABLE DELAY |                      |  |
|--------------|--|-------------------------------|-------------------------------|---------------------|----------------------|--|
|              |  | Interval<br>Section II<br>(a) | Start Date<br>End Date<br>(b) | Ltr<br>Code<br>(c)  | Total<br>Days<br>(d) |  |
| 5/18         | Court Reporter's Sound Recording of Proceedings (Plea) held on Apr. 5, 1976, filed. Gale, R.   |                               |                               |                     |                      |  |
| 6/21/76      | On JON's Jury Assignment List: Ready, jury to be selected #2 on Aug. 23, 1976. Newman, J. m-6/21/76.   |                               |                               |                     |                      |  |
| " "          | Motion to Compel the Govt. to permit Examination of a fingerprint at the Identification Division in Washington, D. C., filed by deft.  | 3                             | 6/21/76                       | G                   |                      |  |
| 8/5/76       | Motion to Compel the Govt. to permit Examination of a Fingerprint at the Identification Division in Washington, D. C. endorsed: Motion off, in view of agreement. Newman, J. m-8/5/76. copies mailed to counsel  | 3                             | 8/5/76                        | G                   | 30                   |  |
| 8/10         | Marshal's return showing service, filed: (5) Subpeonas to testify.   |                               |                               |                     |                      |  |
| 8/16         | Marshal's Return Showing Service, filed: (1 Subpoena to Testify)   |                               |                               |                     |                      |  |
| 8/20         | Marshal's return showing service, filed: (1) Subpoena to Testify and (1) Subpoena to Produce.  |                               |                               |                     |                      |  |
| 8/23         | On JON's Jury Assignment List: Ready #1. Jury selected. Newman, J. m-8/24/76.  |                               |                               |                     |                      |  |
| " "          | JURY TRIAL COMMENCES: 11:10 A.M. Oath on Voir Dire administered. **51 jurors respond to roll call. Court describes case to the jury. One juror excused for cause. Basic panel of 33 names drawn. Govt. allowed 7 challenges and deft 12 challenges. 12 jurors and 2 alts. impanelled and sworn. Testimony to begin 8/24/76. Newman, J. m-8/24/76. ** Deft's Submission of Voir Dire questions, filed.  |                               |                               |                     |                      |  |
| 8/24         | JURY TRIAL CONTINUES: 11:35 A.M. Govt's request to Charge, filed. Govt. request that Special Agent Cotton sit at counsel table-granted. 11:43 A.M. 14 jurors present. 7 Govt. witnesses sworn and testified. Govt. Exs. 1 thru 9, filed. Deft's Motion for Mistrial heard at sidebar-denied. Govt. rests at 3:35 P.M. Deft.'s motion for judgment of acquittal-denied. Deft. Hawley's Request to Charge, filed. 4:05 P.M. Jury excused until 10:00 A.M. of 8/25/76. 4:05 P.M. Court adjourned. Newman, J. m-8/25/76. |                               |                               |                     |                      |  |
| 8/24         | Marshal's return showing service, filed: (1) Subpoena to Testify.  |                               |                               |                     |                      |  |
| 8/25         | Court Reporter's Notes of Proceedings (trial) held on 8/23/76, filed. Gale, R.   |                               |                               |                     |                      |  |

## FINE AND RESTITUTION PAYMENTS

| DATE | RECEIPT NUMBER | C.D. NUMBER | DATE | RECEIPT NUMBER | C.D. NUMBER |
|------|----------------|-------------|------|----------------|-------------|
|      |                |             |      |                |             |
|      |                |             |      |                |             |
|      |                |             |      |                |             |
|      |                |             |      |                |             |

Yr. Docket No. Def.

| DATE<br>1976 | PROCEEDINGS (continued)<br>(Document No.)  | V. EXCLUDABLE DELAY |     |     |     |
|--------------|--|---------------------|-----|-----|-----|
|              |  | (a)                 | (b) | (c) | (d) |
| 8/25         | JURY TRIAL CONTINUES: 10:15 A.M. In the absence of the jury deft. moves to exclude evidence of a felony conviction and moves to sequester witnesses. Motions denied. 10:25 A.M. 14 jurors present. Motion to Sequester witnesses granted. Deft. sworn and testified on his own behalf. 3 Deft. witness sworn and testified. 3 deft. witnesses previously sworn as govt. witness testify. 11:15 Deft. rests. 11:16 jury excused. Deft. moves for Judgment of Acquittal-denied for reasons stated in open Court. 11:55 A.M. to 12:15 P. M. Govt. opens 12:15 P. M. to 12:29 P.M. Deft. closes. 12:30 to 12:43 P.M. Govt. rebuttal. 12:45 P.M. to 1:05 P.M. Court charges jury. 1:05 P.M. Alternates are excused and jurors brought to the jury room. Deft. takes exception to charge. 1:10 P.M. All full exs. and Indictment brought to jury room by U. S. Marshal and deliberations begin. 3:20 P.M. Jury returns with guilty verdict. Jury is polled at deft's request and all answer affirmatively. 3:25 P.M. Jury excused subject to call. Govt. moves for non surety bond. granted. Bond set at \$1,000.00 non surety. Sentencing set for 9/27/76. Deft. moves for Judgment of Acquittal notwithstanding the verdict-decision reserved. 3:30 P.M. Court adjourned in this matter. |                     |     |     |     |
| 8/26         | Appearance Bond in the amount of \$1,000.00 non surety, filed by deft. and approved. Newman, J. m-8/26/76.   |                     |     |     |     |
| 8/27         | Court Reporter's Notes of Proceedings (trial) held on 8/24/76 and 8/25/76, filed. Gale, R.   |                     |     |     |     |
| 8/31         | Deft's Post Trial Motions for Judgment of Acquittal or a New Trial, filed by deft.   |                     |     |     |     |
| 9/3          | Deft.'s Post Trial Motions for Judgment of Acquittal or a New Trial, endorsed: Motions denied. Newman, J. m-9/3/76 copies mailed to Atlys. Hartmere and Bowman.  |                     |     |     |     |
| 9/9          | Memorandum in Support of Deft's Post Trial Motion for Judgment of Acquittal or a New Trial, filed by Deft.   |                     |     |     |     |
| 9/24         | Govt's Response to Deft's Post Trial Motion for Judgment of Acquittal or a New Trial, filed.   |                     |     |     |     |
| 9/27         | DISPOSITION: Impr. 2 yrs. on ct. one, suspended after 60 days and the deft. is placed on probation for three years. Motion for Reconsideration of Motion for Judgment of Acquittal or for New Trial is denied. Bond to remain at \$1,000.00 non surety   |                     |     |     |     |

UNITED STATES DISTRICT COURT  
CRIMINAL DOCKET

| DATE<br>1976 | PROCEEDINGS (continued)<br><br>(Document No.)   | V. EXCLUDABLE DEL. |     |     |
|--------------|---|--------------------|-----|-----|
|              |   | (a)                | (b) | (c) |
| 9/27         | pending appeal. Court advised deft of his right to Appeal / Newman, J. m-9/28/76.   |                    |     |     |
| 9/28         | Judgment and Commitment, filed and entered. Newman, J. m-9/29/76. Two cert. copies handed to U. S. Marshal for service.                                   |                    |     |     |
| 9/28         | Notice of Appeal, filed by deft.  |                    |     |     |
| 9/27         | Court Reporter's Notes of Proceedings (DISP) held on 9/27/76, filed. Russell, R.  |                    |     |     |
| 10/1         | Certified copy of docket entries and Notice of Appeal with endorsement thereon together with Criminal Case Information (Form A) mailed to Clerk U. S.D.C. |                    |     |     |
| 10/1         | Notice of Appeal endorsed: Leave to Appeal in forma pauperis is granted. Newman, J. m-10/1/76.  |                    |     |     |
| 10/7         | JS-3 mailed to A.O.   |                    |     |     |
| 10/7         | Notice of Appeal, filed by deft. (#2) Certified copy of Notice of Appeal and docket entries sent to Clerk, U.S.C.A.                                       |                    |     |     |

FILED

OFFICE OF THE FEDERAL

PUBLIC DEFENDER, U.S.A.

SEPTEMBER 26, 1976

UNITED STATES DISTRICT COURT  
NEW HAVEN, CONNECTICUT

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

v. : CRIMINAL NO. N-76-43

HOWARD E. HAWLEY, JR. :

PF

NOTICE OF APPEAL

Notice is hereby given that Howard E. Hawley, Jr., the above named defendant, appeals to the United States Court of Appeals for the Second Circuit, from the final judgment entered in this proceeding on the 27th of September, 1976 and moves to proceed in forma pauperis.

Dated at New Haven, Connecticut this 28 day of September, 1976.

THE DEFENDANT  
HOWARD E. HAWLEY, JR.

BY

Andrew B. Bowman  
Chief Federal Public Defender  
770 Chapel Street  
New Haven, CT.

*Andrew B. Bowman*

MICROFILM  
Oct 1 1976  
NEW HAVEN

U.S. DISTRICT COURT  
NEW HAVEN, CONNECTICUT  
RECEIVED  
OCT 11 1976

FILED

MAR 18 4 20 PM '76

U.S. DISTRICT COURT  
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

v. : CRIMINAL NO.: N-76-43

HOWARD E. HAWLEY, JR. :

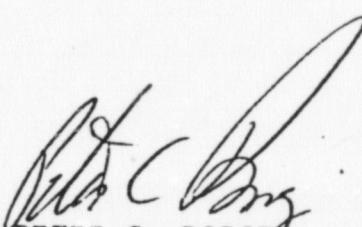
I N D I C T M E N T

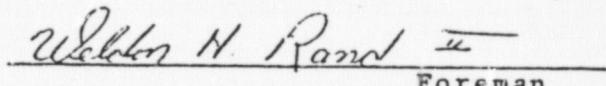
THE GRAND JURY CHARGES:

COUNT I

On or about the 15th day of December, 1975, at New Haven, in the District of Connecticut, HOWARD E. HAWLEY, JR., the defendant herein, wilfully and unlawfully did take and carry away, with intent to steal and purloin, from the Connecticut Bank and Trust Company, Whalley Avenue Office, the deposits of which were then insured by the Federal Deposit Insurance Corporation, the sum of approximately \$7,401, belonging to and in the care, custody, control, management and possession of the said bank, in violation of Title 18, United States Code, Section 2113(b).

A TRUE BILL

  
PETER C. DORSEY  
UNITED STATES ATTORNEY

  
Walter H. Rand II  
Foreman

BY: MICHAEL HARTMERE  
ASSISTANT UNITED STATES ATTORNEY

I hereby certify that this  
is a true copy of the above  
document on file. Date: 3/19/76

RECEIVED

AUG 31 8 23 AM '76

SEP 7 1976

OFFICE OF THE FEDERAL  
UNITED STATES DISTRICT COURT  
PUBLIC DEFENDER, N.H.  
DISTRICT OF CONNECTICUT

U. S. DISTRICT COURT  
NEW HAVEN, CONN.

UNITED STATES OF AMERICA :

v. : CRIMINAL NO. N-76-43

HOWARD E. HAWLEY, JR. :

IP

DEFENDANT'S POST-TRIAL MOTIONS FOR  
JUDGMENT OF ACQUITTAL OR A NEW TRIAL

MICROFILM

SEP 3 1976

NEW HAVEN

The defendant, Howard E. Hawley, Jr., moves this Court pursuant to Fed. R. Crim. P. 29(c) to set aside the jury verdict of guilty returned in this case on August 25, 1976, and enter judgment of acquittal, on the ground that the evidence established a reasonable doubt as to defendant's guilt.

Alternatively, the defendant moves this Court pursuant to Fed. R. Crim. P. 33 to grant him a new trial in the interest of justice, because the verdict returned in this case on August 25, 1976, is contrary to the weight of the evidence.

Dated at New Haven, Connecticut this 30<sup>th</sup> day of August,  
1976.

Respectfully submitted,  
THE DEFENDANT  
HOWARD E. HAWLEY, JR.

BY

Andrew B. Bowman  
Chief Federal Public Defender  
770 Chapel Street  
New Haven, CT.

United States District Court  
FOR THE DISTRICT OF CONNECTICUT 1976  
OFFICE OF THE FEDERAL PUBLIC DEFENDER, NEW HAVEN, CONN.  
FILED

SEP 20 1976  
NEW HAVEN  
United States of America }  
v.  
HOWARD E. HAWLEY }

SEP 20 5 02 PM '76  
No. N-76-43 Criminal DISTRICT COURT  
NEW HAVEN, CONN.

On this 27th day of September, 1976 came the attorney for the government and the defendant appeared in person and by counsel

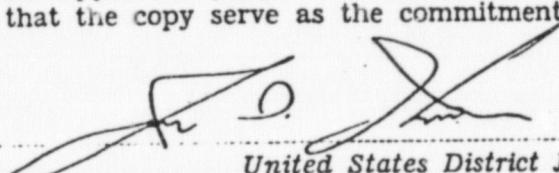
IT IS ADJUDGED that the defendant upon his plea of "not guilty" and the jury having returned a verdict of guilty has been convicted of the offense of violation of Title 18, Section 2113(b), of the United States Code (wilfully and knowingly did take and carry away, with intent to steal and purloin, money, belonging to and in the care of a bank, the deposits of which were then insured by F.D.I.C.)

as charged in Count One  
and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on Count One; execution of sentence of imprisonment is suspended after sixty (60) days and the defendant is placed on probation for a period of three (3) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

  
United States District Judge.

The Court recommends commitment to

  
Clerk.

<sup>1</sup> Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel. <sup>2</sup> Insert (1) "guilty" and the court being satisfied there is a factual basis for the plea; (2) "not guilty, and a verdict of guilty;" (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. <sup>3</sup> Insert "in count(s) number" if required. <sup>4</sup> Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. <sup>5</sup> Enter any order with respect to suspension and probation. <sup>6</sup> For use of Court to recommend a particular institution. app. 8

1 Cottc., - cross

2 the Peperidge Farm store?

3 A Yes.

4 Q That is the report that you gave of the interview you  
5 conducted of Leroy Umstead on December 15, 1975?

6 A Yes, it is.

7 Q Is that accurate to the best of your knowledge?

8 A Yes.

9 MR. BOWMAN: I have no further questions.

10 MR. HARTMERE: I have no questions.

11 (The witness was excused.)

12 MR. HARTMERE: The government rests.

13 THE COURT: I will excuse the jury for a few moments.

14 (In the absence of the jury; 3:35 P.M.)

15 MR. BOWMAN: The defendant Howard Hawley moves for a  
16 judgement of acquittal at this time based on insufficiency of  
17 the government's evidence to make out a prima facie case, and I  
18 rely on Borum vs U.S., and I will supply this with my request to  
19 charge if it's necessary; Hiet vs U.S.; U.S. vs Collon; U.S. vs  
20 Jones; U.S. vs Nazarok.

21 I believe it's the government's burden of proving that  
22 where an employee has legitimate access to a bank in this case  
23 it has the burden of proving that the print was left at the time  
24 the crime was committed.

25 We have had an expert who has testified that print could

1 Cotton - cross

2 have been on there for a year and indeed Howard Hawley worked  
3 and had been in that bank at least ten times according to Mr.  
4 Umstead and possibly as many as twenty times, that he had a right,  
5 a lawful right to be in that bank, that he legitimately had acc-  
6 ess, that he had legitimate access while the print was left on  
7 a money wrapper.

8 The government has not foreclosed the probability that  
9 wrapper was touched prior to it being wrapped around that money.

10 THE COURT: When you say the government has to prove  
11 when it was left, do you mean direct scientific evidence to date  
12 the print?

13 MR. BOWMAN: I am not saying it has to date the print  
14 but what it has to do in the case of a fingerprint is foreclose  
15 any other possibility.

16 THE COURT: Has to foreclose it?

17 MR. BOWMAN: It has to eliminate speculation by the jury  
18 and conjecture by the jury as to when that print was left.

19 THE COURT: Isn't it sufficient if they present some  
20 evidence from which it's reasonable to infer that the print  
21 was left on the occasion when the crime was committed?

22 MR. BOWMAN: I believe in this particular situation where  
23 there is no other corroborating evidence, where there is no other  
24 evidence that Mr. Hawley had any contact with the stolen money,  
25 that they must show either through identification that he had

Cotton - cross

had it in his hand or that he was spending a gread deal after  
this alleged theft took place for them to satisfy the burden  
that they have or proving beyond a reasonable doubt that Howard  
Hawley took the money.

The print wasn't on the money, it was on a wrapper and  
the wrapper was placed on the money on December 8th, and we don't  
know where the wrapper was between December 8th and December 15th,  
and we do know where it was prior to that according to the testi-  
mony of this case.

THE COURT: I am still not clear what standards you  
think apply. Are you saying that these cases that you have men-  
tioned stand for the proposition that there must be direct evi-  
dence other than a print where the print is left by the employee.

MR. BOWMAN: I say that they must show at lease a sub-  
stantial probability that the print was left on the money wrapper  
at the time of the commission of the crime.

THE COURT: That may be. My question is, why isn't it  
sufficient for them to show a circumstance from which that fact  
is readily inferable?

MR. BOWMAN: Because in this particular case under these  
particular facts we have legitimate access.

THE COURT: Wholly apart from the access. That's what  
gets you to the concern that they have to show something more  
than the print.

SANDERS, GALE & RUSSELL  
Certified Stenotype Reporters

464 PROSPECT AVENUE  
HARTFORD, CONNECTICUT

140 CHURCH STREET  
NEW HAVEN, CONNECTICUT

1                   Cotton - cross

2                   MR. BOWMAN: That's correct.

3                   THE COURT: Now, they have shown something more than the  
4 print. It's a matter of some dispute but they have certainly  
5 shown something more. They have shown that at the time he went  
6 into that bank that morning, he and Mr. Umstead had agreed they  
7 were going to leave the bank, go to Mr. Umstead's house, leave  
8 the dog in the basement and they then -- they show there  
9 was a change of plan and sometime during six and eight in the  
10 morning the defendant decided he wasn't going to go along with  
11 that plan, he rather go home, and there is a dispute as to why  
12 he wanted to go home but there is certainly another circumstance,  
13 which I would have thought would support the inference that the  
14 reason he changed his mind is because he had another reason to  
15 want to go home that morning.

16                  MR. BOWMAN: I don't agree that inference is readily  
17 available for the simple fact that Umstead testified that he was  
18 going to Peperidge Farm and he told the FBI that and he also tes-  
19 tified that he doesn't allow animals at Peperidge Farm and that  
20 they were going there right after the bank.

21                  THE COURT: Whether that's the reason that Mr. Hawley  
22 went home is something that may be a matter of fair argument to  
23 a jury. Mr. Umstead's testimony is not that's the reason Mr.  
24 Hawley went home. He says, there was no conversation about the  
25 dog before Mr. Hawley returned. That's his testimony. If the

1 Cotton - cross

2 jury credits that testimony it seems to me that they really --  
3 the only reasonable inference is that he went home to have some-  
4 place to drop off the money.

5 They may not credit his testimony and they find it's  
6 sufficiently attacked by the FBI agent's account, that the food  
7 store being one of the subsequent jobs, they had a change in plan.

8 The way the testimony stands it gives them a very good  
9 reason to think that the defendant went home for a different  
10 reason and I would think that's a very strong circumstance fixing  
11 the contemporaneous placing of the money.

12 MR. BOWMAN: I think what the court is saying is that  
13 because there may have been another reason for Mr. Hawley going  
14 home, that has not been explained at this time. That's the only  
15 corroborating circumstance which places Mr. Hawley's print on the  
16 money wrapper at the time of the commission of the crime and I  
17 can't agree with the court. I can't understand the court's holding  
18 but I can't agree that's a circumstance which is strong enough in  
19 and of itself to corroborate the fact that the print was left at  
20 the time of the commission of the crime.

21 THE COURT: That's why I asked you whether you thought  
22 those cases required something more than just another circumstance,  
23 whether they required some direct evidence of observation of some-  
24 thing of that sort.

25 MR. BOWMAN: That's what they require. The fact is these

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Cotton - cross

2 cases talk about a government's failure to meet a burden and in  
3 no case has the government ever been able to pin point the exact  
4 time when a fingerprint was left other than through an identifica-  
5 tion or expenditures of large sums of money after a robbery.

For instance, in the Collon case, the defendant had been charged with aiding and abetting a bank robbery and his finger-prints were found on a map which -- on which map was designated the victim bank, which was found in a getaway car, and there the Sixth Circuit granted -- reversed the conviction in that case saying that the prints alone on a map, which designated the victim bank, without more, is not enough to sustain a conviction. I have not seen a case where we have had a custodian of a bank, granted, but I don't believe it's the facts in this case are any stronger--

15 THE COURT: I don't know what the access to the map was.  
16 This is a print on a wrapper around some money and the access has  
17 been largely limited by the examination. If this was somebody  
18 whose general duties included frequent or even occasionally touch-  
19 ing of the item, that's one thing, but there has been a lot of  
20 testimony going along way towards precluding a touching during the  
21 course of this employee's duties.

THE COURT: Do you have the citations?

23 MR. BOWMAN: I have it and the request to charge. Also  
24 I would ask the court to pay special attention to the Nazarok case  
25 which is a case where a person apparently had been indicted for

Cotton - cross

2 a Dyer Act offense and where prints are found on the car and the  
3 court saying, without some precision in knowing when the prints  
4 were placed on the car that a conviction based on that alone is  
5 not -- cannot stand.

6                   Similarly Borum vs. U.S. -- but Borum was a case where  
7 there was knowledge of access, as in this case.

8 THE COURT: I will take a short recess.

9 (A recess was taken.)

10 (In the absence of the jury; 4:00 P.M.)

11 THE COURT: I have looked at the authorities Mr. Bowman  
12 has called to my attention but I am satisfied that the motion  
13 can be properly denied. There is evidence in this case that  
14 markedly limits the accessibility of that bank's strap on which  
15 the print was found, limits the defendant's accessibility to it.  
16 It doesn't preclude it totally but this is certainly not a sit-  
17 uation where in a normal course of cleaning his print is on the  
18 item that you would expect to find it on, a chair or some other  
19 item.

20 The government did present evidence to the way the straps  
21 are kept. Teller's testimony was that they are in use and that  
22 the top one would be exposed for perhaps an hour or two hours  
23 and that evidence markedly limits the accessibility of any par-  
24 ticular strap to the defendant.

25 It seems to me on the narrow issue of whether it's more

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1                   Cotton - cr 28

2 probable than not that the print was placed in connection with  
3 commission of crime rather than in connection with cleaning duties,  
4 on the date of the evidence at the moment, that inference is drawn  
5 in favor of the government.

6                   That is just the inference from the print being there.  
7 Now, when you combine that with the evidence of the change of  
8 plan by the defendant to go home at a time when, from the govern-  
9 ment's inference, it's reasonable to think that the money was  
10 available for theft and was in fact stolen, that combined with  
11 the print seems to me as evidence from which reasonable jurors  
12 can find guilt beyond a reasonable doubt.

13                  If they don't credit Mr. Umstead's version of why, of  
14 the circumstance surrounding the defendant leaving e . . if they  
15 choose not to draw the inference that, of course, is up to them  
16 but the accessibility here is limited.

17                  There is this other circumstance of the defendant going  
18 home, and he is placed at the scene of the bank at a time period  
19 which is from the government's other evidence the likely time  
20 period of the commission of the crime.

21                  So in combination -- the motion is denied. What is the  
22 anticipation of the time needed to present the defense because I  
23 am not sure whether we can do it today or tomorrow?

24                  MR. BOWMAN: I have several witnesses I will be calling,  
25 Possibly five witnesses, your Honor.

Morning Session  
(In the absence of the jury; 10:15 A.M.)

MR. BOWMAN: May it please the court, your Honor, I have  
a motion to exclude a felony conviction of my client Howard Hawley

5 Before I say anything further I would ask the court to  
6 sequester all witnesses including possible defense witnesses who  
7 are present in the courtroom right now.

I believe there is a substantial -- I ask they be ex-  
cluded at this time.

THE COURT: As to the argument or just during testimony?

11 MR. BOWMAN: I think the particular argument could pre-  
12 sent a problem also. It really is none of these witnesses con-  
13 cern about the argument I am going to make and I don't feel that  
14 it would serve my client's interest at all to allow them to re-  
15 main in the courtroom.

16 THE COURT: I don't think I can do that. I can sequester  
17 witnesses so they are not present when there is testimony as to  
18 matters about which they are going to testify. I don't know of  
19 any reason to put people out of the courtroom other than that.

20 MR. BOWMAN: My motion to exclude the conviction is that  
21 yesterday the government informed me that they had a certified  
22 copy of an attempted burglary conviction on January 20, 1976 of  
23 Howard Hawley's, in which he received a six month suspended sen-  
24 tence and two years probation.

25 On the basis of the United States vs. Jackson, 1105, Fed

1 Supp. 938 Eastern District of New York, 1975, my motion is based  
2 on that case. There a Federal Court excluded a prior conviction  
3 in the defendant's trial for armed robbery as long as the defendant  
4 and refrained from suggesting a pristine background on direct ex-  
5 amination.

6 I don't believe that this prior felony conviction necessarily  
7 notes dishonesty, such as a perjury conviction might, and  
8 I believe that the probability of prejudice to my client far out  
9 weighs the probative value of the conviction with respect to the  
10 defendant's credibility.

11 On the basis of that case I ask the court to exclude  
12 evidence of that conviction.

13 THE COURT: Do you want to be heard, Mr. Hartmere?

14 MR. HARTMERE: Yes, please. I would start out by saying  
15 that we told defense counsel Monday that we had the conviction.  
16 I didn't have a certified copy at that time. As soon as I got it  
17 yesterday I showed him a certified copy. I have a copy here if  
18 your Honor wants to look at it now.

19 As for an attempted burglary, the defendant was convicted  
20 of that offense on April 23, 1976 of this year. I would suggest  
21 to the court that it is highly probative of the defendant's cred-  
22 ibility.

23 The defendant, when he takes the witness stand, will be the  
24 only one with a felony conviction. I assume, based on the  
25 defense request for instructions, that they want to place high

1 value on his testimony. I think the jury is entitled to know that  
2 he is a convicted felon and I think burglary is close enough to  
3 the offense here to be considered to that effect.

4 We only want the conviction for credibility, however.

5 I am not claiming any prior similar act or subsequent  
6 similar act, however, I don't think it should be taken away from  
7 the jury on that basis and I believe, your Honor, the new federal  
8 rules of evidence provide that it is totally within your Honor's  
9 discretion that you simply weigh the probative value.

10 I think if that's done in this case the government should  
11 be allowed to use this conviction.

12 MR. BOWMAN: If I may just reply briefly. I believe  
13 that when Mr. Hartmere, what he said is exactly true in that this  
14 is so similar and that both of them involve crimes of theft or  
15 attempted theft, the jury will draw an inference that if he pled  
16 guilty to a crime which he committed a month after this incident  
17 then he must have done this also that's exactly why I claim that  
18 the prejudice will outweigh the probative value of impeachment  
19 of the defendant's credibility because I don't believe the jury  
20 will be able to distinguish between the way they -- the law re-  
21 quires them to use the conviction and the inference that they  
22 will naturally draw that if he committed the burglary then also  
23 he must have committed this larceny.

24 THE COURT: That argument, of course, is at the heart  
25 of the use of convictions to impeach in any event and so I can't

1 accept that argument to preclude them in all situations. This is  
2 recent and it's not trivial and it seems to me it's not a basis  
3 to rule it unavailable to the government "in which he plans to  
4 testify. You have the argument available to you. This conviction  
5 is based on a plea.

6 MR. BOWMAN: Yes.

7 THE COURT: You have the argument available to you in  
8 this situation that he acknowledged his guilt in that situation  
9 and in this case he chooses to contest it. That argument is fre-  
10 quently made and sometimes very persuasively.

11 MR. BOWMAN: May I have a moment to confer with my client?

12 (Discussion off the record.)

13 MR. BOWMAN: The defendant is ready, your Honor.

14 MR. HARTMERE: There is one other matter I would like  
15 to bring up. There are several witnesses in the courtroom I  
16 understand who are going to be called by the defense. They were  
17 government witnesses yesterday. I would ask the court to inquire,  
18 ask defense counsel for an offer of proof as to their testimony  
19 which, since I believe it should have been brought out on cross --  
20 they have been on the witness stand and they have been cross  
21 examined extensively. I don't know what the new material is --

22 THE COURT: Well, I don't think he needs to disclose  
23 that simply because they were called in the government's case.  
24 If in the course of the direct examination there is some reason  
25 to think it's repetitious an offer of proof may be required but

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1 HOWARD HAWLEY, called as a witness,  
2 having first been duly sworn by the Clerk of the Court,  
3 was examined and testified as follows:

4 THE CLERK: Please state your name and address.

5 THE WITNESS: Howard Hawley, Jr., 623 Elm, New Haven.

6 MR. BOWMAN: Good morning, ladies and gentlemen.

7 DIRECT EXAMINATION BY

8 MR. BOWMAN:

9 Q Good morning, Mr. Hawley. Are you the defendant in this  
10 case? Are you the defendant in this case?

11 A Yes.

12 Q Please keep your voice up so the ladies and gentlemen of  
13 the jury can hear you. How old are you, Mr. Hawley?

14 A Forty-five.

15 Q How much education have you had?

16 A Twelfth-grade.

17 Q Were you brought up here in New Haven?

18 A Live here all my life.

19 Q Mr. Hawley, in March of this year did you plead guilty  
20 to attempting to break into a grocery store?

21 A Yes.

22 Q For that you received a sentence of six months suspended  
23 and two years probation?

24 A Correct.

25 Q This occurred on January 20th, on or about January 20th

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1 Hawley - direct

2 of this year?

3 A Yes.

4 Q What was your reason for attempting to break into that  
5 store?

6 A I had no food and I am on welfare. I wanted food and  
7 I tried to get some food.

8 Q Mr. Hawley, have you ever worked for Leroy Umstead?

9 A Yes.

10 Q Have you ever worked for him at the Whalley Avenue Branch  
11 of the Connecticut Bank and Trust Company here in New Haven?

12 A Yes. --

13 Q How far do you live from that bank?

14 A Approximately five minute walk.

15 Q How many times have you been in that bank?

16 A Thirty, forty times, maybe more.

17 Q As a custodian how many times have you been in that  
18 bank?

19 A Approximately the same.

20 Q You bank there and you also work there, is that true?

21 A True.

22 Q When you clean the bank ordinarily where do you clean  
23 inside the bank?

24 A The whole bank.

25 Q Would you tell the ladies and gentlemen just exactly

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1 Hawley - direct

2 "Some money is missing."

3 He said, "Do you want to go with me," and I said, "Hell  
4 yeah," excuse the expression.

5 Q Go ahead.

6 A So I went upstairs and just the same as I did when I  
7 opened the door, threw the chain on the table --

8 Q Back where you live with Mrs. McMillan?

9 A I threw the chain on the table like I did with the bread  
10 and cigarettes, like I did with the dog, and left.

11 Q Then you went back to the bank?

12 A I certainly did.

13 Q Then were you interviewed by the FBI agents.

14 A Right. Downstairs. One at a time.

15 Q Then they asked you if you would give your fingerprints?

16 A Right.

17 Q You gave them your fingerprints?

18 A Right.

19 Q Mr. Hawley, do you believe in the obligation of an oath?

20 A Yes.

21 MR. BOWMAN: I have nothing further.

22 CROSS EXAMINATION BY

MR. HARTMERE:

24 Q Mr. Hawley, were you on welfare in December of 1975?

25 A Yes, sir. Still am.

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1 Hawley - cross

2 Q That's why you broke into the store to get food?

3 A Because I didn't have any money.

4 Q You testified you found money wrappers on the floor.

5 A I certainly did.

6 Q What denomination?

7 A I didn't pay it much attention. Just pick them up with  
8 both hands in the trash and ones that are good on the top.

9 Q You check them to see whether they were good?

10 A No. If they are ripped they are no good. If they are  
11 flat I know they are good because they sitting up there looking  
12 at me, some of them were on the floor.

13 Q You have to look at each money wrapper to see if it  
14 was good or used?

15 A No, I am sorry. You don't look at every wrapper.

16 Q You don't look at every wrapper?

17 A But people just take the trash and throw it there. What's  
18 on the floor I mostly pick it up with my hand. I might even throw  
19 good ones away. If I see good ones I put them up on the counter.

20 Q Did you vacuum the areas?

21 A Sometimes I did.

22 Q Isn't that how you clean the trash normally?

23 A No. You pick it up with a bucket, put it in another  
24 bucket, then take a dust mop and the other side is a vacuum.  
25 That's in back of the teller's, the desk -- dust <sup>mop</sup> back.

Rogers - cross

MR. BOWMAN: No further questions.

THE COURT: You are excused.

(The witness was excused.)

MR. BOWMAN: The defendant rests.

THE COURT: Any rebuttal?

MR. HARTMERE: No rebuttal.

THE COURT: The jury will be excused.

(In the absence of the jury; 11:17 A.M.)

MR. BOWMAN: The defendant moves for a judgement of acquittal. The facts that I wish to add to my previous argument I made at the close of the government's case, the defendant has testified that on occasion he had found money wrappers in the bank during the course of his duties, that new ones he replaced on the teller counter and old ones he has thrown away.

In view of the fact that he had legitimate access to the bank, in view of the fact he has a right to put his hands on the trash, to replace unused money wrappers, I believe that the government has not carried the burden of proving beyond a reasonable doubt as a matter of law that the defendant took and carried away with the intent to steal money of that bank in excess of \$100.

THE COURT: Well, I am going to deny the motion. This case is not in the line of cases where items touched is one of fair, widespread availability. It certainly is not a map in the car or a vehicle itself.

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There is testimony from the defendant that he found some of these straps on the floor on occasion. The bank witness' testimony is that rarely occurs. The bank teller's testimony is if one is dropped because they pick one out they promptly replace it, so it's a possibility that the print could have been placed on it by picking up trash and there still is the circumstance which, of course, is a matter now of very sharp dispute as to credibility as to why the defendant went home the morning when it seems likely the funds disappeared, at least the morning of the end of 48 hour period which the funds disappeared.

I think the jury is going to have to give consideration to that credibility dispute. If they are left with reasonable doubt they must acquit but if they resolve that credibility dispute and think the defendant is not telling the truth about the circumstances of his going home that Mr. Umstead is telling the truth, they may draw the inference that the print was placed on that item on an occasion when the defendant committed the crime and went home to hide the money. I will let them ponder that matter.

As far as the request to charge, so you will be guided in argument, the defendant's request I will grant in part so there will be no misunderstanding, dealing with the paragraph at the bottom of the first full page, I will tell them the government has the burden of proving that the defendant touched the ~~wr~~ during the commission of the crime and I will either say or give

words to the effect of the next sentence -- I will give the substance of the next sentence and I will probably say the fact that his fingerprint being found there alone wouldn't justify an inference.

Maybe that's what you meant by the near fact but I will not tell them as you suggested on the next page in the final paragraph that the government must prove beyond a reasonable doubt that the wrapper was so inaccessible as to give rise to the inference that the defendant placed his print on the wrapper during the commission of the crime.

It seems to me there reasonable doubt is to be sustained based on all the evidence and not any one piece of the evidence, so I won't charge as to that last sentence because I don't think that's the law.

MR. BOWMAN: I have submitted the specific request to charge because I view that as the primary issue in a case. I also request specific charge on the defendant's prior conviction, that it's not to be used as substantive evidence, naturally, in this case.

THE COURT: All right.

MR. HARTMERE: For my argument, is the court going to give --

MR. BOWMAN: I don't want to interrupt. Let me finish one further point. I would also request to charge that the defendant has the perfect right to be here in the courtroom during

1 the presentation of witnesses against him because the prosecutor  
2 made a point in his cross examination that the defendant had  
3 been sitting here throughout the entire testimony, that he heard  
4 all the witnesses, and I believe that this jury and the defendant  
5 both have a right to know that the defendant has an absolute  
6 constitutional right to be here to have witnesses testify in front  
7 of him.

8 THE COURT: All right.

9 MR. HARTMERE: Is the court going to give the government  
10 request #2 on possible doubt or words to the effect?

11 THE COURT: Well, endeavoring to set forth what reasonable  
12 able doubt means, I will give you the same instruction I usually  
13 give. It does have some distinction between reasonable doubt  
14 and I think the other phrase is possible or imaginary doubt, so  
15 I won't necessarily use the wording but I think that language  
16 has been heard enough times to be familiar. It may have some  
17 such phrase as it doesn't have to be proven to a mathematical  
18 certainty, or something like that.

19 MR. BOWMAN: The test is whether or not, is that doubt  
20 which would cause a prudent person to hesitate and make a decision  
21 in a matter of importance which he is deliberating in a criminal  
22 case --

23 MR. HARTMERE: I don't have any problem with the charge  
24 on reasonable doubt. The Court will give a charge on circumstan-  
25 tial evidence?

THE COURT: Yes. Again, not necessarily in your language  
but as to what circumstantial evidence is and the fact that it is  
not an inferior type of evidence to direct evidence. That point  
will be made. I don't think I will give the illustrations that  
you have that you can, of course, argue them. I don't expect to  
discuss possible punishment since that hasn't been alluded to in  
any of the questioning.

MR. BOWMAN: Can we have some time?

THE COURT: Yes.

(A recess was taken.)

(Jury present; 11:55 A.M.)

THE COURT: Ladies and gentlemen, now the evidence in  
the case is concluded and you're going to hear the arguments from  
counsel.

Their arguments are not evidence. The evidence is what  
you heard from the witnesses and the exhibits you will see, but  
the arguments of counsel are usually helpful to a jury so that  
you will understand the claims that each side makes from the evi-  
dence that you have heard, so I urge you to pay close attention  
to them.

(Mr. Hartmere made an opening statement on behalf of  
the government.)

(Mr. Bowman made a closing statement on behalf of the  
defendant.)

(Mr. Hartmere made a closing statement on behalf of

the government.)

(Sidebar conference.)

THE COURT: As I heard the arguments nobody seemed to make anything of what the defendant said when interviewed by the agents. The reason I raise this with you, is you probably know there was a case recently in our Circuit that reversed a conviction for lack of that charge as to voluntariness of statements that were in the nature of confessions.

Statute 3501 defines those statements as confessions or any incriminating statement. I am not sure that what he said when interviewed by the agent was incriminating but I called you to the bench because if I give instructions I run the risk of hurting the defendant by in any way suggesting that what he said was of such significance they have to be careful of that and find the voluntariness, so I have to see if you want any charge on the voluntariness on those statements.

MR. BOWMAN: No.

THE COURT: I want to be sure you don't want it.

MR. BOWMAN: No, your Honor. I am asking the court to make clear the defendant has an absolute right to be in this courtroom. I think it was improper for the government to argue that there was an inference -- adverse inference to be drawn from the fact that the defendant sat in the courtroom.

THE COURT: I don't think that was the argument. I think that simply having been in the courtroom he had an opportunity

1 to in effect tailor his testimony to what he heard. I understand  
2 your point and I will certainly cover it.

3 (Sidebar conference concluded.)

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## JURY CHARGE

THE COURT: You heard the evidence and the arguments  
and now it is my task to give you the instructions of law that  
are to govern your consideration of this case.

It is exclusively the function of the court to set forth  
the rules of law and the instructions as to their application.

On these issues of law you must accept the rules of law  
as I explain them to you.

You are not at liberty to apply your own notion of what  
the law is or even what the law ought to be.

When it comes to determining the facts, then you are  
the sole judges of the facts. You consider the testimony, you  
recall it, analyze it, weigh it, and decide from all the testimony  
what you think the facts are.

If counsel refer to some facts and you recall them  
differently, rely on your own recollection. If in the course  
of these instructions I should refer to any facts, just to ill-  
ustrate what the claims are, and you recall the facts differently,  
again, rely on your own recollection because as jurors you are  
the sole judges of the facts of this case.

In this case as in any criminal case the defendant is  
presumed to be innocent unless and until he is proven guilty  
beyond a reasonable doubt. That presumption of innocence was  
with the defendant when he was first presented for trial. It  
continues with him throughout the trial and as far as you are

concerned he is innocent and continues to be innocent unless and until such time as all the evidence produced in the trial, considered in the light of these instructions and deliberated upon by you, satisfies you beyond a reasonable doubt that he is guilty, and the burden of proving the defendant guilty beyond a reasonable doubt rests with the government.

The defendant does not have to prove his innocence. This means that before the defendant could be found guilty the government must prove to you beyond a reasonable doubt each and every element of the crime charged, and whether that burden of proof has been sustained depends not on the number of witnesses or the length of their testimony but on the nature and quality of the testimony.

Now, reasonable doubt means simply a doubt founded upon reason. It is a doubt as will be entertained by a reasonable person after all the evidence in the case is carefully analyzed and considered.

A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence, since the burden is on the government to prove a defendant guilty beyond a reasonable doubt of each and every element of the crime charged.

A defendant has the right to rely upon a failure of the prosecution to establish such proof. However, absolute or mathematical certainty is not required but there must be such certainty as satisfies your reason and judgment and such that you feel

1 conscientiously bound to act upon.

2 Reasonable doubt is not a fanciful doubt or a whimsical  
3 or capricious doubt for anything relating to human affairs and  
4 depending on human testimony open to some possible or imaginary  
5 doubt.

6 A reasonable doubt is such a doubt as would cause a  
7 prudent person to hesitate before acting in matters of importance  
8 to himself or herself.

9 So if the evidence warrants in your judgment the con-  
10 clusion that the defendant is guilty so as to exclude every other  
11 reasonable conclusion, you should declare it to be guilty.

12 On the other hand, if on all the evidence you have a  
13 reasonable doubt as to the guilt of the defendant, then you  
14 must find him not guilty.

15 Now, as you know this case is United States against  
16 Hawley and the charges are set forth in an indictment which will  
17 be sent into you in the jury room.

18 I will deal with the allegations in a moment. Let me  
19 first say about the indictment that an indictment by a Grand Jury  
20 is simply the formal method of accusing a defendant. It defines  
21 the crime charged and the manner of their alleged accomplishment,  
22 but the indictment is without any bearing or significance in your  
23 consideration of this case and it is to be accorded no weight by  
24 you in determining the guilt or innocence of the defendant.

25 The Grand Jury, after all, hears only the government's

1 side of the case. There is no cross examination and no defense  
2 witnesses so you are the first jury that heard the whole case,  
3 and the fact that a Grand Jury has indicted is no evidence at all  
4 for you to consider.

5 Federal law makes it a crime to take away with intent  
6 to steal money exceeding \$100 belonging to or in the custody of  
7 a bank, the deposits of which are insured by the Federal Deposit  
8 Insurance Corporation. I will read you the statute. It is very  
9 short.

10 It says, "Whoever takes and carries away with intent to  
11 steal money of value exceeding \$100 belonging to or in the care,  
12 custody, control, management or possession of any bank shall be  
13 punished," and the indictment in this case charges that the de-  
14 fendant committed a violation of that statute.

15 Now, there are five essential elements of the crime  
16 charged in the indictment. Each of which the government has the  
17 burden of proving beyond a reasonable doubt before there could  
18 be a conviction.

19 The five elements are these: first, that the defendant  
20 actually was present in the bank on the date in question, December  
21 15, 1975; second, that the defendant took and carried away from  
22 the bank on that date money in excess of \$100; third, that the  
23 money belonged to or was in the care, custody, control, management,  
24 possession of the bank on that day; four, that the deposits of the  
25 bank on that day were insured by the Federal Deposit Insurance

Corporation; five, that the defendant in taking and carrying away money in excess of \$100 of the bank acted willfully and with intent to steal.

You are entitled to conclude that money that is used by tellers and available for their use in handling customer business is money in the care, custody, control of a bank in the meaning of that statute.

You are entitled to conclude from the evidence you heard about the Federal Deposit Insurance Corporation certificate of the payment of premiums for insurance for that period of time. From that you would be entitled to conclude that the bank was insured by the Federal Deposit Insurance Corporation on that day.

As to the last element of the offense, and an act must have been done willfully and with specific intent, and an act is willfull only when it is done voluntarily and purposely with a specific intent to do what the law forbids.

Laxity, inadvertence, carelessness, negligence, even gross negligence is not enough to show willfullness.

Specific intent, as the term suggests, means more than a general intent to commit an act, a person with specific intent who knowingly does what the law forbids, purposely intending to violate the law and recklessly disregarding the law.

Now, obviously in deciding whether or not those elements have been established, and particularly in deciding the element that's most disputed, namely, whether the defendant has been

1 proven beyond a reasonable doubt to be the person who took and  
2 carried away money from that bank, you're going to have to give  
3 some consideration to the credibility of the witnesses you heard.  
4 And there are certainly considerations you are entitled to have  
5 in mind. You can consider the appearance of each witness on the  
6 stand, try to size him or her up. Did they appear to be telling  
7 the truth, did they appear to be witnesses who could recall  
8 accurately the events in question who could report them accurately  
9 to you.

10 You are entitled to consider whether the testimony that  
11 each witness gave you was plausible. Does it ring true to you,  
12 does it fit together with other evidence in the case that you  
13 are satisfied is true?

14 The testimony of a witness may be discredited or, as  
15 it's sometimes called, impeached by showing that on a previous  
16 occasion the witness said something inconsistent or different  
17 with what the witness is saying on the stand, and you are en-  
18 titled to consider what witnesses were shown to have said at an  
19 earlier occasion in making up your mind as to whether what they  
20 said in court is true or not.

21 Of course, the fact that a witness is incorrect on some  
22 aspect of his testimony doesn't mean he is incorrect in other  
23 aspects of his testimony. A witness could even deliberately lie  
24 about one part and be correct about other parts, but if you find  
25 the witness has lied to you on a material point in his testimony

then, naturally, you would be suspicious about the rest of his testimony and you would be entitled to disregard it.

You can also consider as to every witness whether that witness has any interest in the outcome of the case or any bias.

Now a person may have a bias and may have an interest in the outcome and still give entirely truthful testimony, but bias, if you find such exist, or interest in the outcome, if you find that exist, is a circumstance you are entitled to consider in deciding whether to believe the testimony of any witness that you heard.

In this case you heard what we call an expert witness. That is a witness who by his experience in training or education is entitled to give an opinion, and you heard the fingerprint examiner from the FBI give his opinion as to the comparison between the fingerprint of the defendant and the print found on the strap in evidence.

A person who had certain experience or educational training in the field is entitled to give an opinion, but it's still a matter for the jury to decide how much weight to give that opinion.

You are entitled to credit the opinion, if you are satisfied that it's supported by satisfactory explanation, but you don't have to. What weight you give that opinion of that witness is entirely up to you.

In short when you decide issues of credibility of all

1 the witnesses in the case you are to apply the same considerations  
2 and use the same sound judgment that you apply in considering  
3 matters of credibility that arise in important questions in your  
4 every day lives.

5 A defendant who wishes to testify is an entirely compe-  
6 tent witness. He is entitled to testify and his testimony is to  
7 be judged by the same standards as applies to all the other wit-  
8 nesses.

9 I should mention one further point. The testimony of  
10 the defendant was sought to be impeached by the fact that he has  
11 been convicted upon his plea of another offense.

12 Let me express a strong word of caution here that that  
13 particular bit of so called impeaching testimony. That evidence  
14 of another conviction is available for your consideration only  
15 to the limited purpose of deciding to what extent, if any, you  
16 think it has a bearing on his credibility as a witness.

17 It is to play no part whatever in your consideration of  
18 whether he is the man who committed the crime. That is an import-  
19 ant distinction for you to make but you have to make it very  
20 consciously.

21 In other words, you cannot think or permit it to effect  
22 your deliberations at all that, well, he did commit one crime and  
23 so, therefore, maybe he committed this one. That is a use of that  
24 conviction that you are not permitted to make.

25 If you think that conviction has some bearing on his

credibility you are entitled to consider it for that limited purpose but only for that purpose. Whether he committed the crime of which he is charged in this case depends on the evidence in this case and whether that evidence persuades you beyond a reasonable doubt of his guilt of this offense.

The defendant has an absolute right to be present throughout the trial, to sit at counsel table and to hear all the testimony that was presented.

In deciding some of the issues in this case you can consider what the attorneys have referred to as circumstantial evidence. Generally there are two types of evidence, direct evidence by which we mean the evidence of an eye witness, what somebody actually saw occurring, then there is circumstantial evidence which consists of facts proved from which the jury may infer by a process of reasoning other facts sought to be established as true.

Of course, different inference may be drawn from facts that you find are true. The prosecution asks you to draw one set of inferences and defendant asks you to draw another. It is for you to decide which common sense inferences you think it reasonable to draw from the facts you find are true.

Circumstantial evidence may be received and is entitled to such consideration as you find it deserves. No greater degree of certainty is required when evidence is circumstantial than when it is direct, for from either type of evidence there cannot

1 be a conviction unless you are persuaded by that evidence beyond  
2 a reasonable doubt of the guilt of the defendant.

3 Now, obviously one central issue on which circumstantial  
4 evidence is offered has to do with whether the defendant is the  
5 person who took the money from the bank and the government relies  
6 on the finding of what they allege is his fingerprint on a strap  
7 covering some money that was found on the bank steps the morning  
8 after the disappearance was noted.

9 The government has the burden of proving that the defendant  
10 touched the money wrapper during the commission of the crime  
11 charged, and you may not speculate or guess as to when the print  
12 was placed on that money wrapper.

13 The defendant as a custodian performing custodial or  
14 janitorial services had lawful and legitimate access to the bank  
15 on December 15, 1975. He had the right to be there.

16 So one of the issues of this case, if you find his print  
17 was placed on the money strap, is whether the print was placed  
18 in the course of his duties as a janitor on some other occasion  
19 while doing his janitorial work or whether it was placed during  
20 the course of committing the crime.

21 If you find the defendant's print was placed on that  
22 strap you cannot infer from that fact alone that the defendant  
23 is guilty. You can convict only if you are persuaded beyond a  
24 reasonable doubt from all the evidence in the case that the de-  
25 fendant placed his print on that strap in the course of committing

the crime charged.

The government contends there are circumstances that make it reasonable to draw that inference and they rely in part on Mr. Umstead's testimony that the defendant decided to change plans concerning mating the dogs at Umstead's house and that the defendant instead decided to go back to his home.

The defendant disputes this testimony, and he testifies that he went home because Umstead told him to take his dog home because the dog couldn't be at the next job.

So there is a credibility dispute on that matter. But I remind you that the defendant does not have to prove his innocence and he does not have to prove his version of the facts.

The government has the burden of proving guilt beyond a reasonable doubt. So you are to weigh all the evidence that you have heard, decide what you think the facts are, draw the inferences you think are reasonable.

If after doing that you have a reasonable doubt about the defendant's guilt you must declare him not guilty.

If, on the other hand, you are persuaded beyond a reasonable doubt that he is guilty of the crime charged then you should find him guilty.

Now, I remind you you are duty bound to apply the law as I have explained it to you. When you reach the jury room, select one of your number as the foreman or forelady to preside over your deliberation. Determine the facts from the evidence

apply the law as I have explained it and then return your verdict fairly, uprightly and without a scintilla of prejudice. When you reach a verdict it must be unanimous. The duty of each juror is to discuss and consider the opinions of all the other jurors, but in the final analysis it is your individual duty to make up your mind and to decide this case on the basis of your own individual judgement and conscience.

In just a moment I will let you return to the jury room and begin your deliberations when you get there. Please wait just a moment before deliberating before the clerk brings the indictment and the exhibits in, and when those have arrived begin your deliberations.

I think the marshall has probably arranged for you to have lunch, so I leave it to you whether you have lunch first or deliberate a little or do it jointly. That is entirely up to you.

When you have reached a verdict let the Court know through the bailiff and return to the courtroom and announce your verdict.

I will excuse the two alternates. They have sat patiently with us. Obviously your attendance throughout the trial guarantees us that we will have twelve jurors ready and able to deliver as a jury of twelve, so you perform a service by being here and listening carefully to the testimony even though at this point your services have come to an end and you are not free to participate in the ultimate resolution, but I nevertheless thank you for your attendance and attention to the testimony, so that the

two alternates are excused and the jury of twelve may retire to the jury room.

(In the absence of the jury; 1:05 P.M.)

THE COURT: Does the government have any exception or further request to charge?

MR. HARTMERE: No.

THE COURT: Does the defendant have any exception or further request?

MR. BOWMAN: I have one exception, your Honor. The exception is that I don't believe your Honor went far enough in instructing the jury not only that the defendant has the absolute right to be present during the trial of this case but also that they are to draw no adverse inference, as the prosecutor tried to have them draw during his summation, from the fact that he is present in this courtroom and he has a right to have witnesses confront him with the evidence, or to have the government confront him with the evidence, I should say.

THE COURT: I didn't understand that there was an argument that they should in any way hold it against him that he was here. I took the argument to be that he has been sitting here hearing the testimony and, therefore, his testimony, according to the government was tailored to fit with what he heard. That is fair argument. That is not an improper argument. I don't think I said because he is sitting here you should think ill of him.

I did give them the instruction that I thought was

1 was requested, that he had an absolute right to be here and hear  
2 all the testimony, so they didn't think there was anything unusual  
3 about it but if you start to negate an inference that wasn't even  
4 sought to be drawn, I'm really going a little too far.

5 Other than that there are no exceptions?

6 MR. BOWMAN: No.

7 THE COURT: Have you seen that the exhibits are in order?

8 MR. BOWMAN: It says here charged criminally --

9 MR. HARTMERE: It's an aka that the defendant testified--  
10 it was elicited from two other witnesses that he was known as  
11 Red. I covered it up. If you want it uncovered you can uncover  
12 it. It was your request I covered it.

13 THE COURT: I think the defendant himself used that name  
14 so I don't think that was a surprise. Is that exhibit in that  
15 form acceptable to the defendant?

16 MR. BOWMAN: Yes, your Honor.

17 THE COURT: Is that the fingerprint card?

18 MR. BOWMAN: That's right.

19 THE COURT: The marshall will take the indictment and  
20 the exhibits and counsel will be in recess until 2:15.

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